Temp Masters, Inc. *and* Sheet Metal Workers International Association Local Union No. 24, AFL–CIO. Case 9–C–40822

July 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 19, 2004, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The Respondent has excepted to the judge's conclusion that it violated Section 8(a)(1) of the Act by coercively interrogating employee Matt Wandstrat when, in late November or early December 2003, Manager Mark Pack approached Wandstrat and asked him if a union representative had visited the Respondent's workplace. We reverse the judge's decision in this one respect.[2]

The Respondent is a refrigeration and heating, ventilation, and air conditioning (HVAC) contractor that operates in several Midwestern states. At the time of the events in this case, the Respondent was engaged in the installation of HVAC systems at two locations in Brown County, Ohio—the Brown County Engineering Office and the Ohio Highway Patrol Post. Seven of the Respondent's employees were working at the Brown County Engineering Office, and two of the Respondent's employees were working at the Ohio Highway Patrol Post.

In late November or early December 2003, one of the employees working at the Ohio Highway Patrol Post contacted Troy Wagner, a union business representative, about obtaining union representation for the employees at the Respondent's Brown County projects. Wagner visited both Brown County worksites to deliver union authorization cards to employees.

Later that day, Mark Pack, the Respondent's project manager for both Brown County projects, visited the Ohio Highway Patrol Post. Pack asked Wandstrat, one of the two employees of the Respondent working there, whether a union representative had come to the jobsite. When Wandstrat replied that he did not know, Pack shook his head and left the area.

An employer violates Section 8(a)(1) of the Act by interrogating an employee only if the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel & Restaurant Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Relevant factors include the background of the relationship, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. Id.

Pack's single question did not "appear[ ] to be seeking information upon which to take action against individual employees." *John W. Hancock, Jr.,Inc.*, 337 NLRB 1223, 1224 (2002), enfd. 73 Fed. Appx. 617 (4th Cir. 2003). Pack did not attempt to determine the views of any individual employees, including Wandstrat. Although Pack shook his head in reaction to Wandstrat's ("do not know") response, we find that Wandstrat could not reasonably have interpreted that gesture, unaccompanied by any remarks, as a threat of retaliation sufficient to convert Pack's isolated inquiry into a coercive interrogation.

Further, Pack did not question Wandstrat in a context contaminated by other unfair labor practices. Concededly, there were other unfair labor practices here, all occurring after the interrogation. In *John W. Hancock, Jr.,Inc.*, supra, the Board found that an interrogation was not coercive even though there were subsequent unfair labor practices in the case. Rather than holding that subsequent unfair labor practices are never relevant to the issue of coerciveness of a preceding interrogation, however, the Board focused on the relationship between the two events. 337 NLRB at 1225 fn. 5 (2002). Here, as in *John W. Hancock*, the Respondent's subsequent unfair labor practices bore little, if any, relationship to the preceding "interrogation." Wandstrat's answer (that he "did not know") obviously did not form the basis for the Respondent's awareness of Wandstrat's union activity. Nor is there any nexus to the other unlawful conduct. Therefore, although we have adopted the judge's findings that

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] For the reasons stated by the judge, we find that the Respondent violated Sec. 8(a)(3) when it discriminatorily transferred employees Joseph Stapleton, Paul DeVaux, Samuel Lunsford, and Matthew Wandstrat, and when it discharged Stapleton, DeVaux, and Wandstrat for refusing those transfers.

the Respondent subsequently violated Section 8(a)(3) by, inter alia, discriminatorily transferring Wandstrat and firing him for refusing to accept that unlawful transfer, those independent unfair labor practices do not establish that Pack's one question was coercive.

In sum, the circumstances surrounding Pack's question do not support a finding that it was coercive, and we dismiss the allegation that it violated Section 8(a)(1). [3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Temp Masters, Inc., Uniondale, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 29, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, transfer, or otherwise discriminate against any of you for supporting Sheet Metal Workers International Association, Local Union No. 24, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Paul DeVaux, Joseph Stapleton, and Matthew Wandstrat full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Paul DeVaux, Joseph Stapleton, and Matthew Wandstrat whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make Samuel David Lunsford whole for any loss of earnings and other benefits resulting from his transfer to Danville, Illinois, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharges of Paul DeVaux, Joseph Stapleton, and Matthew Wandstrat, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

TEMP MASTERS, INC.

Patricia Rossner Fry, Esq., for the General Counsel.
David W. Miller and Thomas R. Biehl, Jr., Esqs., (Baker & Daniels), for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cincinnati, Ohio on September 16 and 17, 2004. The charge was filed January 22, 2004 and the complaint was issued on April 30, 2004.

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) by transferring employees Joseph Stapleton, Paul DeVaux, and Samuel David "Dave" Lunsford from construction projects in the vicinity of Georgetown, Ohio, just east of Cincinnati, to a worksite in Danville, Illinois, 254 miles away. These transfers occurred on December 12, 2003, a few

[3] Member Liebman would not dismiss this allegation. Rather she would find that Project Manager Pack's questioning of Wandstrat violates Sec. 8(a)(1). In addition to the factors cited by the judge, Pack's position of authority, his arrival on the jobsite on the heels of the Union's visit (suggestive of surveillance), his direct question to an employee who had taken care not to reveal his union activities, and Wandstrat's untruthful denial that the union representative had been there together show that this was no mere "isolated inquiry" but rather an unlawful, coercive interrogation.

days after Respondent became aware that the Union had filed a petition with the NLRB to represent employees at the Georgetown jobsites. The General Counsel also alleges that Temp Masters violated the Act by similarly transferring Matthew Wandstrat from Georgetown to Danville a week later. Further, the General Counsel alleges that Respondent violated the Act by terminating three of the four employees; Stapleton, DeVaux, and Wandstrat, because they were unwilling or unable to transfer to the Danville project.

In addition to the alleged Section 8(a)(3) violations, the General Counsel alleges that Respondent, by Project Manager Mark Pack, violated Section 8(a)(1) in interrogating Matt Wandstrat, on or about December 2, 2003, as to whether a union representative had met with employees.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Temp Masters, Inc., a corporation, installs and services commercial refrigeration systems and heating, air conditioning and ventilation (HVAC) systems. Temp Masters has its headquarters in Uniondale, Indiana. It annually performs services valued in excess of $50,000 in states other than Indiana. Temp Masters admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Sheet Metal Workers International Association, Local Union 24, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

During 2002–2004, Respondent worked on as many 30 projects at a time installing commercial refrigeration equipment and HVAC systems. These projects were located in six states: Indiana, Ohio, Michigan, Kentucky, Illinois, and Iowa. They ranged in duration from 3–12 months. Respondent employs about 35 workers in its installation department, some of whom regularly move back and forth between projects. Respondent also has approximately 25 service technicians, who regularly work on existing refrigeration and HVAC systems. In addition to its headquarters office in Uniondale, Indiana, Respondent maintains branch offices in Cincinnati and Indianapolis.

In June 2002, Respondent signed a contract to install the HVAC systems at an office building and two garages (one for vehicle storage; the other for vehicle maintenance) which were being constructed for the Brown County, Ohio Engineering Office near Georgetown, Ohio (hereinafter "Brown County"). Work was scheduled to begin in August 2002 and was scheduled to be completed in October 2003. Completion of this project was delayed for a variety of reasons. Respondent did not substantially complete its work at the Brown County site until approximately May 1, 2004.

Temp Masters also contracted to install the HVAC system at an Ohio Highway Patrol Post, no more than two miles away from the Engineering Office. This project ran from September 2003 to March 2004. Both projects were "prevailing wage" projects on which employees were paid $34.67 per hour.[2] Respondent was required to maintain a certified payroll for the Georgetown projects listing all employees who performed work on these sites (E.g., GC Exhs. 4 & 5).

Initially, Gil Bardige, Respondent's then Director of Ohio Operations, was in charge of the Brown County Engineering Office project. At some point prior to December 1, 2003, Project Manager Mark Pack assumed responsibility for both the Brown County and Ohio Highway Patrol Projects. Respondent hired new employees, who lived in the vicinity of Georgetown, to staff these two projects. One of these, Stephen Mitchell, who was hired on March 31, 2003, acted as the day-day foreman at Brown County. Michael Fahy, who was hired in August 2003, became the day-day foreman at the Highway Patrol site. Sometime prior to December 1, 2003, Mitchell and Fahy traded places. On occasion, Respondent also brought Temp Masters employees from other worksites to work on the Brown County project for a day or several days (Tr. 64, 221).[3]

The alleged discriminatees, "Dave" Lunsford, Joseph Stapleton, Paul DeVaux, and Matthew Wandstrat, were among the new employees hired. Wandstrat was hired in April 2003. He had no prior construction or HVAC installation experience. Stapleton, a member of the carpenter's union, was hired in July;

[1] Tr. 159, line 24, should indicate a resumption of recross-examination by Respondent's counsel rather than a continuation of an inquiry by this judge.

[2] Respondent did not initially pay its employees the prevailing rate, but, in September 2003 made catch up payments to rectify this omission—at least with regard to those employees who worked at the Georgetown projects continuously.

[3] Paul DeVaux testified that towards the end of his employment, by which I infer he means in December 2003, two Temp Masters refrigeration employees would come to either the Brown County or Highway Patrol Post for a day or several days "to set units" and then leave (Tr. 221). Dallas Mosher is the only person fitting this description whose name appears on the certified payrolls for December.

In addition, James Smith, a skilled refrigeration pipefitter, worked 23 hours at the Brown County project during the payroll week ending December 14, 2003 and 40 hours the week ending December 21, 2003 (Exh. R-7). Despite this fact, Smith's name does not appear on Respondent's certified payroll for either week (Exh. G.C-4, Tr. 284), Smith also worked on the Brown County project on August 1, September 5, and October 13, 2003, and as discussed later, in January and February 2004.

Jeff Griffin, described by Kenneth Powell as a skilled refrigeration supervisor (Tr. 280), worked at Brown County on August 1, August 8, and September 5. Brian Ramseyer, an unskilled employee, worked at Brown County on September 5 and October 3, 2003 (Tr. 282). Griffin and Ramseyer also worked at Brown County in January 2004.

Exhibit R-7 indicates Respondent charged substantial amounts of Kedric Joe Carnes' time to the Brown County site for the weeks ending December 7 and 14, 2003 [33 hours and 25 hours respectively], as well as the week ending January 18 , 2004 [14 hours]. Kenneth Powell testified that although Carnes' time was charged to the Brown County project, he may have merely delivered equipment to the site as opposed to performing HVAC installation work (Tr. 292, 293). This, according to Powell, may be the reason that Carnes does not appear on the certified payroll (Tr. 295–296, 441–448) However, Powell conceded that, although he doesn't recall doing so, he may have had Carnes perform on-site work at Georgetown for a couple of days (Tr. 296).

Lunsford was hired in August, and DeVaux in September. All four were hired as unskilled laborers. However, Stapleton's employment application indicated that he had 25 years of carpentry experience and some welding skills. He was hired initially at $13 per hour, while the other three were hired at $11 per hour. DeVaux's application reflected some HVAC installation experience and Lunsford's showed some pipefitting and general construction experience.

Another employee, Curtis Trueax, who had prior HVAC installation experience, was hired in September. Michael Powell, the son of Temp Masters President Kenneth Powell, was hired in November 2003 to work on the Georgetown projects. Until December 12, 2004, these Georgetown employees worked exclusively in southern Ohio. In addition to working at the two projects near Georgetown, DeVaux, Wandstrat, and Lunsford occasionally worked at another prevailing wage job at Cowan Lake State Park, 30–40 miles north of Georgetown.[4] Lunsford also worked at a Bigg's grocery store on the eastern side of the Cincinnati metropolitan area on three or four evenings, after having worked a full day on one of the Georgetown construction sites.

As of December 1, 2003, the employees working regularly at the Brown County site were Fahy, Curtis Trueax, an experienced sheet metal worker, Michael Powell, a son of Respondent's owner, Kenneth Powell; and Stapleton, DeVaux, and Lunsford. Matt Wandstrat was assigned to the Ohio Highway Patrol project, under the supervision of Stephen Mitchell, who is his uncle.

Sometime in 2002, Troy Wagner, a business representative of the Union, contacted all the bidders on the Brown County job to inform them that it was a prevailing wage project and that he would be monitoring the successful bidder to insure that it was paying the prevailing wage. In the summer of 2003, Respondent's Director of Operations, Gil Bardige, called Wagner to inquire about the possibility of employing some of the Union's journeymen. Wagner told Bardige that Respondent would have to sign a collective-bargaining agreement with the Union and that all its employees on site would have to join. Wagner later had a similar conversation with Respondent's President, Kenneth Powell. Respondent did not pursue the matter further.

Wagner also contacted employees on the two Brown County sites about signing union authorization cards. In late November or early December 2003, Steve Mitchell, the jobsite foreman at the Highway Patrol post, contacted Wagner about obtaining authorization cards. Wagner gave some cards to Mitchell and Matt Wandstrat, who distributed them to Mike Fahy, DeVaux, and Lunsford. They did not give one to Stapleton, because of their perception that he was a friend of Project Manager Pack. Curtis Trueax expressed opposition to the Union.

In regards to the Section 8(a)(1) allegation, Matthew Wandstrat testified that after Wagner came to the Highway Patrol jobsite to give the authorization cards to himself and Mitchell, Mark Pack came to the jobsite and asked him if somebody from the Union had come to the site to meet with him and other employees that day. Pack also testified that he asked Wandstrat if a union organizer was on the site. It is not clear how Pack would have known or suspected that an organizer visited either project, but I infer that Pack was told by either Michael Powell, the owner's son, or Curtis Trueax, an employee opposed to the Union, both of whom were working at Brown County when Mitchell distributed authorization cards to employees at that site.

Fahy, Mitchell, Wandstrat, DeVaux, and Lunsford signed union authorization cards on December 2 or 3, 2003. The Union then filed a petition with the NLRB seeking to represent a unit of seven sheet metal installation and fabrication workers (GC Exh. 6). A management labor consultant informed Kenneth Powell that the petition had been filed on December 8.[5]

Four days later, on the afternoon of Friday, December 12, Kenneth Powell called Mark Pack and instructed him to tell Stapleton, DeVaux, and Lunsford to report to a Shop Rite grocery store in Danville, Illinois on Monday morning December 15.[6] The Danville Shop Rite was not a prevailing wage project. Lunsford and DeVaux would have been paid $11 per hour and Stapleton $13 per hour, compared with the $34.67 per hour they were receiving on the Ohio construction projects. Respondent had been installing the coolers and other refrigeration equipment in this store, which had yet to open for business, since August 2003. Pack informed the three employees of their new assignment, 254 miles from Georgetown, at about 3:30 p.m. The same day, Respondent's Operations Manager, Dallas Mosher, formally assigned a skilled refrigeration pipefitter, James Smith, to the Brown County project for the following week (GC Exh. 7, pg 3). Smith, who had worked 23 hours at Brown County the week of December 8–12, worked 48 hours there the week of December 15–19 (R. Exh. 7).[7]

[4] Several witnesses testified that Cowan Lake is east of Georgetown. The Rand McNally Atlas shows it to be to the north, near Wilmington, Ohio.

[5] The Regional Director conducted a representation election on January 5, 2004. One employee voted against representation; Respondent challenged the 5 other ballots. The Board held that the election was tainted by the organizational activities of Stephen Mitchell, who, it concluded, was a statutory supervisor. The Union then withdrew its petition.

[6] Pack also testified, after a little prompting by the General Counsel, that Powell said something like, "we'll show them!" Pack testified that he understood this to indicate that the transfer was being implemented in retaliation for employee support for the Union. I decline to credit Pack's testimony in this regard. Kenneth Powell fired Pack in March 2004, after Pack had worked for Respondent for approximately 5 years. Pack conceded that he is rather bitter over his discharge. Given this fact, the fact that Pack needed the prompt and the fact that Powell denies saying any such thing leads me to consider Pack's testimony on this point with sufficient skepticism that I am unable to find it credible.

On the other hand, it is significant that Kenneth Powell personally called Mark Pack to direct Pack to transfer the three employees to Danville. Powell did not personally call any other supervisors at other jobsites to direct them to send employees to Danville (Tr. 448). As discussed later, Powell's unusual personal involvement in the transfers, the timing of the transfers in relation to Powell's awareness of the representation petition and the suddenness of the transfers are factors in my determination that they were discriminatorily motivated.

[7] Exhibit R-7 indicates that Smith was paid about $17 per hour, rather than the prevailing rate.

DeVaux and Stapleton

In a face-to-face conversation with Mark Pack on the afternoon of December 12, and in a voice mail message he left for Kenneth Powell on December 14, 2003, DeVaux informed Respondent that he could not go to Illinois because he was a single father and had nobody to take care of his son. Devaux said he did not want to lose his job and would still be interested in work closer to his home (Tr. 214–216). DeVaux had no further contact with Respondent.

Stapleton informed Powell that he had to go to Ashland, Kentucky from December 15–17, in order to take care of his father's estate. Powell told Stapleton to call him when he returned from Ashland and that he needed him to work in Danville and had no more work for Stapleton in Georgetown. Stapleton then told Powell that may not be able to travel to Danville at all. Powell responded by telling Stapleton that if he didn't go to Danville, he would have no more work in Brown County.

Powell deemed DeVaux and Stapleton to have terminated their employment with Respondent by refusing to accept their assignment to Danville.

Lunsford

Sometime between December 12 and 14, Lunsford called Kenneth Powell. He told Powell he could not be in Danville on Monday morning due to the fact that he was driving a rental vehicle and would have to obtain a different vehicle to drive to Danville. Powell told him that was acceptable, but that Lunsford should get to Danville as soon as he could. Lunsford reported to the Danville Shop Rite on Wednesday morning, December 17, 2004. The only one who appears to have worked at that site the entire week is a skilled start-up refrigeration technician, David Lewis, who had been working continuously at the site since mid-October.

Justin Hughes and laborers Scott Hall, Ross Perry, and Rod Green were transferred from a Wal-Mart store in Pekin, Illinois, to the Danville Shop Rite on Wednesday, December 17.[8] Hughes supervised Lunsford during his 3 days at this project. Hughes, Hall, and Perry had all worked at the Danville site during the previous week, prior to working at the Pekin Wal-Mart, which is 126 miles from Danville. David Powell, described by Kenneth Powell as a skilled pipefitter, and laborer Joe Hinton also worked at Danville that week, apparently on Monday, December 15 and Tuesday, December 16. They were then transferred to a job at the Cincinnati airport, where they both had security clearances.

Matt Wandstrat

On Thursday, December 18 or Friday, December 19, Mark Pack informed Lunsford that he was to report to Ohio Highway Patrol site on Monday morning, December 22. Matt Wandstrat worked at the Highway Patrol on Monday and Tuesday, December 15 and 16. He was off of work sick Wednesday through Friday. He testified that his Uncle, Foreman Steve Mitchell, called him and suggested he work Saturday because Respondent was trying to transfer him to Danville, Illinois. Wandstrat and Curtis Trueax worked 8 hours at the Highway Patrol site on Saturday, December 20.

Wandstrat testified that he called Pack on Sunday, December 21 and told him that he couldn't get to Danville unless Respondent advanced him money for gasoline. According to Wandstrat, Pack told him that this was against company policy. Wandstrat called Respondent's emergency answering service on December 21 in the late afternoon. He left a message to the effect that he had talked to Mark Pack and could not make it to Danville the next day, but could make it the next week after he got a paycheck (R. Exh. 14).

During the 2-week period from December 22, 2003–January 2, 2004, only one Temp Masters employee, David Lewis, worked at the Danville Shop Rite (R. Exh. 12).[9] Lewis did not work Thursday through Sunday, December 25–28 (Tr. 494–500). I find that Respondent did not need Wandstrat's services in Danville for those 2 weeks.

For the pay period of Monday through Sunday, December 22–28, 2003, Dave Lunsford worked 38 hours at the Brown County site, almost all of it alone (GC Exh. 4). Fahy, Trueax, and Powell worked at the Highway Patrol site that week (GC Exh. 5). Although, Respondent normally gives its employees a paid holiday on December 26, when it falls on a Friday, Lunsford worked 10 hours that day, as did Trueax and Fahy.

Respondent apparently had no employees at the Brown County site during the pay period December 29–January 4, 2004. Indeed, in the 2-week period December 22–January 4, 2004, Lunsford was the only Temp Masters employee to work at the Engineering Office (also see GC Exh. 15). Kenneth Powell testified at Tr. 438–439 that he transferred Fahy and Trueax to the Highway Patrol site during those 2 weeks due to the absence of Wandstrat and Mitchell at the Highway Patrol site. He stated that if he did not allocate labor to the Highway Patrol site, Temp Masters would hold up the work of the drywall trades (Tr. 438–439).

Moreover, Powell testified that he would not have transferred Fahy and Trueax if Mitchell and Wandstrat had been available to work at the Patrol Post. In fact, Respondent not only transferred Fahy and Trueax from Brown County to the Highway Patrol Post during the last 2 weeks in December, but it transferred Michael Powell as well (GC Exhs. 4 and 5). This evidence, as well as the December 24, 2003 Progress Meeting minutes and correspondence for the Highway Patrol site, GC Exhs. 8–10, and 19, establishes that there was plenty of work available for the alleged discriminatees at both Georgetown jobsites in December 2003.

On Monday, morning, December 29, 2003, Matt Wandstrat called Respondent's answering service. He left a message stating that Respondent had shorted his check 2 hours and that he did not have the funds to get to Illinois (GC Exh. 23).

[8] Although, Kenneth Powell described Ross Perry as a laborer, his wage rate, $15.50 per hour, was the same as that of Hughes, who he described as a skilled refrigeration supervisor. Hall and Green's wage rate were $10 per hour; Lunsford's $11 per hour, and Dave Lewis' $26 per hour.

[9] Christmas and New Year's Day fell on Thursday of each of these weeks. None of Respondent's employees worked at the Georgetown or Danville sites on either day.

For the pay period, Monday, December 29–Sunday, January 4, 2004, Lunsford and Trueax worked 61 hours at the Highway Patrol site. Mike Powell was at the site for 24 hours and Steve Mitchell for 14. Mike Fahy worked for 2 hours on December 29, but Kenneth Powell fired him that day for insubordination (GC Exh. 5, Tr. 427).

On Tuesday, January 6, two newly-hired employees, Robert Wear and Robert Bentley, worked at the Highway Patrol site. Bentley stayed there the rest of the week. Wear worked at the Brown County project Wednesday through Friday. For the pay period January 12–18, Bentley worked 40 hours at Brown County; Wear worked 18 hours at Brown County and 14 at the Highway Patrol site. For the period January 19–25, Bentley worked 40 hours at Brown County. Wear worked 24 hours at Brown County and 16 at the Highway Patrol. For the period January 26–February 1, Bentley worked 40 hours at Brown County. Wear worked 28 hours at Brown County and 7 at the Highway Patrol. Bentley and Wear continued to work a substantial number of hours at Brown County at least through February 13 (GC Exhs. 16 & 17).

Bentley apparently had some experience in HVAC installation. However, Respondent has not established that Bentley had any more experience relevant to the work at Georgetown than Devaux and Stapleton, who had been performing HVAC installation work for several months prior to their terminations and also had some relevant experience prior to their employment by Respondent.

Wear had no relevant experience to the work he was hired to perform in Georgetown. He was essentially an unskilled laborer with no more experience in HVAC installation than Wandstrat. I do not credit Kenneth Powell's testimony that, in January 2004, he asked Mark Pack to hire two skilled sheet metal workers. There is no reason for Pack to have disregarded his instructions in hiring Wear.

I conclude that Respondent hired Bentley and Wear to replace some or all of the discriminatees. In addition, Respondent continued to employ James Smith at the Brown County Engineering Office, and possibly at the Highway Patrol Post as well.[10] Despite the fact that Smith's name does not appear on the certified payroll for Brown County, the following hours, that Smith worked, were charged to the Brown County Engineering site:

Payroll period[11] ending December 21: 28 hours;

Payroll period ending December 28: 17 hours;

Payroll period ending January 11: 21 hours (Jeff Griffin also worked 11 hours);

Payroll period ending January 18: 5 hours (14 hours of Joe Carnes' and 14 of Dallas Mosher's time was also charged to Brown County for that week);

Payroll period ending February 1, 2004: 35 hours (25 hours of Brian Ramseyer's time was also charged to Brown County for that week).

To reiterate, the hiring of Wear and Bentley, the overtime worked by Lunsford and Trueax, the continued employment of James Smith and others at the Brown County site, and the correspondence and progress reports for the Highway Patrol Post (GC Exhs. 8–10, 19), establish that there was no shortage of work at the Georgetown projects that provides a nondiscriminatory basis for the transfers of the discriminatees to Danville, Illinois. I also rely on the lack of work at the Danville Shop Rite from December 22, 2003–January 2, 2004 in reaching this conclusion.

Analysis

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil and Gas Co.*, 337 NLRB 1120 (2002).

The Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *American Gardens Management Co.*, 338 NLRB 644 (November 22, 2002). Unlawful motivation is most often established by indirect or circumstantial evidence, such as suspicious timing and pretextual or shifting reasons given for the employer's actions.

> Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge.

W.F. Bolin Co. v. NLRB, 70 F. 3d 863, 871 (6th Cir. 1995).

As noted by the Court of Appeals for the Ninth Circuit in *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book. Nor is the trier of fact-here a trial examiner-required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he cer-

[10] The record does not contain a document similar to Exhibit R-7 that shows the number of hours for each employee that was charged to the Highway Patrol Post.

[11] Generally the posting date in R-7 is 5 days after the end of the payroll period.

> tainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal-an unlawful motive-at least where, as in this case, the surrounding facts tend to reinforce that inference.

Accord, *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988), *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991).

In the instant case, Respondent clearly knew that a number of employees had indicated support for the Union when its labor consultant notified Kenneth Powell of the filing of the representation petition. The timing and very sudden transfer of DeVaux, Stapleton, and Lunsford 4 days later, combined with Respondent's departure from its past practice with regard to these employees, is sufficient to establish a prima facie case that this transfer was motivated by Respondent's animus towards this union activity. While many of Respondent's employees regularly moved from job to job, often great distances apart,[12] the Georgetown employees had been working near their homes for months and were never transferred to projects outside of southern Ohio until Respondent became aware of the representation petition.[13]

Moreover, Respondent's insistence of transferring Wandstrat to Danville for the week of December 22, is even stronger evidence of antiunion animus and discriminatory motive. Respondent has not made a credible nondiscriminatory explanation for Wandstrat's transfer. Indeed, its explanation, given the lack of activity on the Danville worksite after December 17, is a pretext. Thus, this explanation is itself evidence of animus and discriminatory motive. It is absolutely clear that Wandstrat's services were needed in Georgetown and were not needed in Danville for the 2 weeks starting on December 22.

Given my conclusion that the General Counsel has established a prima facie case of discrimination, the burden shifted to Respondent to demonstrate that these transfers, and the resulting terminations of DeVaux, Stapleton, and Wandstrat would have occurred in the absence of union activity. It has not done so.

Respondent obviously had a nondiscriminatory motive in sending some of its employees to work at the Danville Shop Rite during the weeks of December 15–19 and 22–26. It had a number of employees working at that jobsite in almost every week beginning with August 4, 2003. However, there is no credible nondiscriminatory explanation for the sudden and unprecedented transfer of employees from Georgetown, Ohio to work in Danville in mid-December.

Kenneth Powell testified that he received an irate call from the Shop Rite owner, Al Abbed, on or about December 12, asking him how many employees would be at the Shop Rite on December 15 (Tr. 349–350). Abbed, however, did not testify about calling Powell on or about December 12. Instead, he testified that he started calling Powell almost every day in mid-November (Tr. 401).

Respondent's payroll transaction journal for the Danville Shop Rite, R. Exh. 12, is consistent with frantic calls from Abbed to Powell in early November, and possibly in early December, but not on December 12. This journal is also consistent with an unusual demand for labor at the Danville site for the payroll period ending November 9, 2003 and possibly the one ending December 14 (which was the week before Lunsford, DeVaux, and Stapleton were ordered to report to Danville). It is not consistent with a sudden need for the Georgetown employees the weeks of December 15–19 and 22–26. This journal shows that the following number of Temp Masters' employees worked the following number of hours at the Danville Shop Rite from early August 2003 until early April 2004. The journal indicates a payroll posting date, which is about 5 days after the close of the pay period. Thus, the figures for August 15, 2003 reflect the payroll period of approximately Sunday to Sunday, August 3–10, 2003.

Payroll Period Posted:	Employees:	Total Hours Worked:
8/15/03	7	233
8/22	5	221
8/29	6	185
9/12	3	93
9/19	5	187
9/24	4	165
10/3	4	132
10/10	5	196
10/17	5	214
10/24	7	219
10/31	ZERO	ZERO
11/7	8	246
11/14	10	602
11/21	4	177
11/28	3	118
12/5	1	29
12/12	2	117

[12] For example, Exh. R-6 shows that Jeff Griffin, James Smith and Brian Ramseyer were constantly moving from job to job, often great distances apart. Smith traveled 254 miles from Cincinnati to Danville, IL on November 11; 188 miles from Ft. Wayne to Cincinnati on December 2; 175 miles from West Chester, Ohio to Fort Wayne on December 5; 173 miles from West Chester to Ft. Wayne on December 9; 225 miles from Ft. Wayne to Brown County on December 11; 225 miles from the Ohio Highway Patrol Post to Ft. Wayne on January 2, 2004; From the Ohio Patrol Post to Brown County on January 6, and January 14, 2004 [although he appears on neither certified payroll]; From Brown County to the Ohio Highway Patrol on January 26, 2004 and back.

Respondent's exhibit 19 shows that James Smith moved back and forth between projects such as a Marsh store in Ft. Wayne, Indiana, a Wal-Mart in Louisville, a Marsh store in Indianapolis, a Wal-Mart in Tell City (located on the Ohio River across from Kentucky) and a Wolfgang-Puck at the Cincinnati Airport.

Similarly, the exhibit shows that Brian Ramseyer, an unskilled employee, moved back and forth between such projects as the Marsh store in Ft. Wayne, the Wal-Mart in Louisville, the Wal-Mart in Pekin, Illinois, the Wal-Mart in Tell City and a Sam's Club in Normal, IL.

[13] Respondent's accommodation of Lunsford, i.e., allowing him to report to Danville on Wednesday, December 17, appears to weigh against discriminatory motive in the transfer. However, most of the employees transferred to the Shop Rite store did not arrive until December 17, an indication that it was not essential that Lunsford report on the 15th.

12/19	7	330
12/26	8*	263 [work week 12/15–19]
1/2/04	1**	30 [work week 12/22–26]
1/9	1	31
1/16	4	92
1/23	3	134
1/30	5	99
2/6	2	70
2/13	1	53
2/20	1	27
2/27	1	41
3/5	3	40
3/12	1	ZERO
3/19	1	8
3/26	3	16
4/2	1	1
4/9	ZERO	ZERO
4/16	1	7

*Week in which Lunsford, DeVaux, and Stapleton were assigned to Danville.

**Week in which Wandstrat was assigned to Danville.

Thus, I find that Respondent has not established that a sudden demand for labor from Abbed necessitated the transfer of the Georgetown employees. Finally, Kenneth Powell testified that he sent employees to the Danville Shop Rite to assist the owner in opening his store before the Christmas holiday. However, after working there 3 days, Respondent's employees returned to other projects and the store was not ready to open until February 2004.

Respondent simply made no credible attempt to demonstrate the reason it suddenly decided to rely on Georgetown employees to staff the Danville job immediately after learning of the representation petition, when it had never moved these employees out-of-state previously. Moreover, the hours, including overtime, worked by Temp Masters' employees at Brown County and the Ohio Patrol Post after December 15, fails to establish that their services were no longer needed in Georgetown. If anything, the amount of work remaining on these projects establishes the opposite.

While there were delays and sometimes a hiatus in the flow of work at Georgetown, the record indicates that this was a recurring phenomenon. When Respondent shifted employees between distant jobsites prior to December 12, it had never included the Georgetown employees in these shifts. Moreover, after insisting that Wandstrat transfer to Danville, there is no evidence that Respondent ever transferred Georgetown employees to jobsites outside of southern Ohio. I conclude that, in the absence of a convincing nondiscriminatory explanation as to why Respondent suddenly relied upon Georgetown employees to staff the Danville job, that this was done in retaliation for their union activity.[14] Therefore, I find that the transfers of the four employees violated Section 8(a)(3) and (1). Since I find that the transfers were illegal, I find that Respondent also violated Section 8(a)(3) and (1) in terminating DeVaux, Stapleton, and Wandstrat for refusing the illegal transfers, *Nissen Foods*, 272 NLRB 371 at 402 (1984), enfd. 780 F.2d. 1016 (3d Cir. 1985); *Monroe Auto Equipment Co.*, 169 NLRB 142 (1968), enfd. 420 F.2d. 861 (5th Cir. 1969).[15]

Alleged Section 8(a)(1) violation

Whether interrogation by a supervisor violates Section 8(a)(1) depends upon whether under the circumstances, it reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act, *Rossmore House*, 269 NLRB 1176 (1984). As Matt Wandstrat had not openly demonstrated support for the Union when Pack asked him about the presence of organizers on the jobsite, I find Pack's inquiry to be coercive. Moreover, since Wandstrat and Mitchell were the only two employees on the Highway Patrol jobsite, Wandstrat would reasonably have concluded that Pack was seeking to determine whether he had demonstrated an interest in the Union. I therefore find that Respondent, by Pack, violated Section 8(a)(1) as alleged in Complaint paragraph 5.

SUMMARY OF CONCLUSIONS OF LAW

1. Respondent, by Mark Pack, violated Section 8(a)(1) in interrogating employee Matt Wandstrat regarding the presence of union organizers at the Ohio Highway Patrol jobsite on or about December 2, 2003;

2. Respondent violated Section 8(a)(3) and (1) in transferring Paul DeVaux, Joseph Stapleton, and Samuel David Lunsford from the Brown County, Ohio projects to the Danville, Illinois Shop Rite on December 12, 2003;

3. Respondent violated Section 8(a)(3) and (1) in transferring Mat Wandstrat from the Ohio Highway Patrol project to the Danville, Illinois Shop Rite project on or about December 21, 2003.

4. Respondent violated Section 8(a)(3) and (1) in terminating the employment of Paul DeVaux, Joseph Stapleton, and Matt Wandstrat for refusing to accept the illegal transfers to the Danville, Illinois Shop Rite project.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement[16] and make them whole

[14] It was unnecessary for the General Counsel to prove that Respondent knew which employees supported the Union in view of the fact that the transfers were effectuated to inhibit and discourage union activity at the Georgetown worksites. Likewise, in this situation it is irrelevant that Stapleton did not engage in union or other protected activity to establish that his transfer and subsequent termination violated Section 8(a)(3) and (1), *Big Three Industrial Gas & Equipment Co.*, 230 NLRB 392, 404 (1977), enfd. 579 F. 2d. 304 (5th Cir. 1978).

[15] Respondent's brief analyzes this case in terms of the doctrine of constructive discharge. This is not a constructive discharge case. Respondent essentially fired DeVaux, Stapleton and Wandstrat for refusing to accept a discriminatory transfer.

[16] Respondent offered "Dave" Lunsford and Curtis Trueax positions at other jobsites when work at the Brown County project was substantially completed in April or May 2004. Both declined this offer. But for the discrimination against them, I find that the same offer would

for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Temp Masters, Inc., Uniondale, Indiana, its officers, agents, successors, and assigns, shall

Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Discharging or otherwise discriminating against any employee for supporting Sheet Metal Workers International Association, Local 24, AFL–CIO, or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Paul DeVaux, Joseph Stapleton, and Matthew Wandstrat full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Paul DeVaux, Joseph Stapleton, Matthew Wandstrat, and Samuel David Lunsford whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify each of the employees in writing that this has been done and that the discharges will not be used against each of them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Uniondale, Indiana office copies of the attached Notice marked "Appendix."[18] Copies of the Notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. Respondent shall also duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees who were employed by the Respondent at the Brown County, Ohio Engineering Office and Ohio Highway Patrol Post at any time since December 2, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 19, 2004.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Sheet Metal Workers International Association, Local Union No. 24, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Paul DeVaux, Joseph Stapleton, and Matthew Wandstrat full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Paul DeVaux, Joseph Stapleton, and Matthew Wandstrat whole for any loss of earnings and other benefits

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have been made to DeVaux, Stapleton, and Wandstrat. Thus, I conclude that as a remedy, Respondent must offer these three employees employment that is substantially equivalent to their positions at the Brown County projects, wherever such positions exist.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make Samuel David Lunsford whole for any loss of earnings and other benefits resulting from his transfer to Danville, Illinois, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Paul DeVaux, Joseph Stapleton, and Matthew Wandstrat, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

TEMP MASTERS, INC.